

D. Practical Issues Related to Enforcement⁵¹

The practical problems associated with establishing an effective enforcement and execution system in the Russian Federation are considerable and the effort required should not be underestimated. This issue is not simply one of the need to create the court enforcer's service and to establish the legal procedures which will be implemented in order to carry out execution activities — although these are certainly necessary and important elements. This issue is also one of the state of development of markets and of the institutions that support them, and of the cost of some of the tools which may be taken for granted in other systems. Some of the underlying institutions and infrastructure which make reasonably certain and efficient execution possible in other systems have not yet had time to develop in the Russian Federation, while others are costly and may not develop on a broad scale until there is sufficient demand and ability to pay. While this certainly does not mean that judgments cannot be executed until they do develop, it does mean that the task may be difficult and creative strategies may need to be employed.

Under planning there was a very limited need for the services now to be provided by the court enforcer. Most of the property and funds of enterprises were used and transferred according to the requirements of economic plans and much of the accounting between entities was conducted without cash transfers. When an inter-enterprise dispute was resolved, the property or funds could be transferred by direct order of the controlling ministry, or direct accounting adjustment between the two enterprises, not requiring any acts of will of the enterprise or its managers. Failure of individuals to carry out transfers or other actions in accordance with properly issued instructions was punishable by significant administrative or even criminal liability. The property ownership of individuals was quite limited by law, as was their capacity to have domestic or foreign bank accounts. Under these circumstances, the ability of an enterprise or an individual to refuse to comply with a judgment, or to hide assets, or to transfer funds or assets to use for personal gain, was extremely limited. The kinds of mechanisms used to trace assets, to freeze accounts, and to allow for the enforcement of obligations in an otherwise unrestricted atmosphere were simply not required, and so did not exist.

It should be noted that many of the mechanisms used by those charged with enforcing a judgment in complex market environments were not created solely, or even primarily, for this purpose. Registry systems for various kinds of property, systems that track use of credit and certain kinds of bank transfers, the credit and financial history records that make it difficult for a person or company owing a judgment to continue to receive financing or to operate in another location, and other institutions of modern market life were put into place over time for the purpose of facilitating business activities. For example, the certainty about the ownership of property provided by registry systems ensures that transactions are final and provides security to the parties, while credit and

⁵¹ The number and type of practical issues that must be addressed in enforcing a court judgment will, of course, vary with the type of judgment or dispute and the parties involved. A full discussion of all of the possible issues is well beyond the scope of this Handbook. This section addresses only a small number of structural problems that are likely to affect most enforcement proceedings.

financial tracking and reporting allows businesses to make informed decisions about potential customers and partners with whom they are unacquainted. As it happens, these mechanisms also have substantial roles to play in allowing enforcement authorities to track assets and ensure that judgments are paid. These types of services and infrastructure will, presumably, develop as Russia's economy develops and the need for them increases. In the interim, priority may need to be given to rules which allow the most serious forms of asset hiding and improper transfers to be discouraged and, in appropriate circumstances, to be reversed. The creation of more detailed systems of credit reporting and monitoring primarily for enforcement purposes, however, is unlikely to be successful, since it will be avoided by commercial actors rather than viewed as a useful source of information and assistance, and probably cannot be funded without commercial application.

Another way in which the level of development of markets and the health of the economy affect the execution process is in their impact on markets for productive assets that may be sold to meet a judgment. In conditions of economic downturn, or in areas in which there is little in the way of available investment capital, the auction of the equipment and other productive assets of a commercial entity against whom a judgment has been issued may bring results disappointing to the judgment creditor. In recent years, however, monetary assets — bank accounts and cash — have been quite easy to transfer and to hide, and it is the physical assets that are less likely to disappear. Land and buildings enjoy a brisk demand in many locations, and may be the most valuable physical asset against which execution may be made. There are, however, still significant complications concerning the transfer of land in ownership and the prevalence of complex use agreements in office and industrial buildings may make them less useful as an asset to satisfy a judgment in some cases.⁵² These are not issues that changes in the execution process per se can address, but rather problems that will be alleviated with time, growth and continuing development of legislation in other areas. They are, however, issues that those involved in commercial disputes should remain aware of, and should take into account both before disputes arise — in considering the advisability of structuring security measures into business transactions — and after they have arisen — in considering the possibility of a request for imposition of security for the claim during consideration or security for the execution.

At the time of this writing, there is another significant issue that must be addressed in discussing the execution of judgments in commercial cases — the issue of the competing creditors of the judgment debtor, its possible bankruptcy, and the effect of these on the process and outcome of execution. As discussed above, the court enforcer is obligated to inform the Federal Bankruptcy Agency about execution proceedings which involve the basic productive assets of an enterprise, and the Federal Bankruptcy Agency may take steps to ensure that other creditors of that enterprise are informed of the situation or may itself take steps to initiate bankruptcy proceedings. The initiation of a

⁵² It is possible to transfer rights in a long-term lease and to auction such rights as a part of the property of the debtor. Article 62 of the Law on Execution specifically provides for such auctions. The transfer of the leased premises, however, may require the approval of the lessor, which may complicate the transaction should the lessor be unwilling to give a blanket approval.

bankruptcy process requires the suspension of the execution proceedings, and if the debtor is liquidated in bankruptcy the judgment creditor will be included among the creditors making claims against the bankruptcy estate. Priority order for the payment of claims from the assets of a bankruptcy estate places debts to employees and to the state (including taxes and contributions to the Pension and other funds) above debts contracted in the normal course of business. The level of indebtedness of many enterprises to employees and to the state at the current time is extremely high, which reduces the likelihood of payment to ordinary creditors during a bankruptcy proceeding. While this is not a matter that is within the control of a party to a commercial dispute, its practical significance may weigh on decisions concerning such matters as settlement agreements or whether to object to a proposed installment scheme for execution. A similar issue may arise with respect to a judgment debtor against which the higher-priority claimants have already obtained execution orders, since the priority order for the payment of competing judgment creditors also places creditors in the normal course of business in a lower priority than debts to employees, to state Pension, Employment and Insurance Funds, and to the budgets of any level of the state.